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LOS ANGELES BAR ASSOCIATION

(City and County—Organized 1888)

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Certain Grounds of Federal Activity in Colorado River Development*

By Reuel L. Olson *of the Los Angeles Bar*
Professor of Law, University of Southern California

In this discussion of several of the alleged bases of federal activity in Colorado River development, it will be my purpose to discuss only two of the asserted grounds of federal activity in Colorado River development.

These bases of federal activity in Colorado River development may be stated in summary form as follows: navigability of the Colorado River, the interest of the federal government in the administration of its public lands, the activities of the Federal Power Commission, the duties of the Reclamation Service, the international and inter-state status of the Colorado River, the function of the federal government under the Rivers and Harbors Act and the Flood Control Act, and the power of eminent domain and the police power of the federal government. This paper will be limited to certain general remarks based upon minutes of the Colorado River Commission and a consideration of the second and seventh of the enumerated grounds of federal activity in Colorado River development; viz., the interest of the federal government in the administration of its public lands, and the power of eminent domain and the police power of the federal government.

"The Federal Government," said Chairman Hoover at the first meeting of the Colorado River Commission in Washington in 1922, "is interested through its control of navigation, through protection of its treaty obligations, through development of national irrigation projects and through virtual control of power development depending upon the use of public lands."[1] Mr. Ottamar Hamele, Chief Counsel of the Reclamation Service, when requested to state what he considered the federal rights to be, declared that they included, first, "the paramount right of navigation, which affects flood control." Continuing, his words were: "The United States also has the ownership, I believe, of all of the unappropriated water of the Basin. It has an interest in the building of irrigation works under the national irrigation act. It has rights under the Federal Water Power Act that possibly don't conflict with anything in this compact, but there are possibilities that we could conceive of by which that Act could be amended so that those rights might become in conflict with this compact unless they were reserved. It also has rights in connection with its treaties with the Indian tribes."[2] Mr. L. Ward Bannister, water rights attorney of Denver and special lecturer at Harvard Law School, is on record as favoring ownership of a Colorado River dam by the federal government because "in the first place, the federal government has lands in California and Arizona, and it ought to control the agency by which the reclamation is to be made. In the second place, if private companies are to be the owners and operators of private plants at the dam, the ownership by the government of the dam would be a means of exercising proper supervision and control over those operators in order that their service to the public will be what it ought to be, and, in the third place, if the Senate and the President should conclude a treaty with old Mexico with respect to the waters of the river and allow Mexico a part of them, then the Government should be in control of or be the owner of the reservoir in which the water is to be stored, so that obligation may be met."[3]

These remarks of Messrs. Hoover, Hamele, and Bannister do not include a reference

[1]Colorado River Commission, *First Meeting*, Department of Commerce, Washington, January 26, 1922, 10 A. M., p. 3.
[2]Colorado River Comission, *Twenty-Second Meeting*. Bishop's Lodge, Santa Fe, N. M., November 22, 1922, 10 A. M., pp. 27-28.
[3]Hearings on H. R. 2903, Sixty-Eighth Congress, First Session, House Committee on Irrigation and Reclamation, Part I, .p 227, Feb. 21, 1924.

*Editor's Note: Owing to the present interest in the appointment by Secretary of the Interior Work of a committee to advise him on the question of whether or not the federal government may proceed with the development of the Colorado River without a compact between the interested states, we have requested Dr. Reuel L. Olson, author of *The Colorado River Compact* (pp. xxiv, 257) to discuss the legal features of such proposed federal action, for the benefit of readers of the BULLETIN.

to all possible grounds of federal activity in Colorado River development. A more complete enumeration would add the assertion that the interstate nature of the stream constitues a ground of federal action. In this connection, some have called attention to the fact that the river forms a boundary between states, that it cuts across state lines, and that the electrical energy which it is contemplated shall be developed, will form an important item in interstate commerce. From other quarters, the suggestion has been made that the federal government should proceed under the Rivers and Harbors Act or under the Flood Control Act or possibly by means of a commission appointed by the Supreme Court, leaning heavily upon the power of eminent domain or the police power of the federal government for the authority necessary in the actual working out of details.

We now turn to the second of the alleged grounds of federal activity, the authority of the federal government to proceed with Colorado River development because of its constitutionally imposed responsibilities in the care of public lands. "Article 4, Section 3, of the Constitution gives to Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' "[4] "Congress has full power to dispose of the public lands and property of the United States and to place such reservations and restrictions thereon as it may consider desirable."[5] "It (the federal government) has the right to construct a dam upon its own land."[6] These are some of the assertions made by those thinking of the public lands as a possible basis of government activity.[7]

Certain limitations upon the power of Congress to deal with the public lands have been suggested by students of the question. "Congress has the power absolutely to control, regulate and dispose of the public lands, but under the guise of terms of control or disposal no new power can thereby be vested in the United States, or the rights reserved unto the states, or their property, be destroyed," according to Mr. John Franklin Shields of Philadelphia. Mr. Shields also raised the question of whether or not the laws of the several states or the regulations of Congress would control a particular situation if the United States itself as an owner of public lands is subject to the riparian laws of the states where its lands are situated, at the same time that Congress has the authority to make all necessary rules and regulations concerning the public lands.[9]

There is a phrase in one of the recent decisions of the Supreme Court of the United States which suggests a possible basis of action by the federal government in Colorado River development. In the case of *Sanitary District of Chicago v. United States,* Mr. Justice Holmes asserted that the issues raised by the alleged lowering of the level of the Great Lakes by reason of Chicago's diversion of water for the purpose of operating the Sanitary District did not lead to a controversy between equals but that the United States was

(Continued on page 28)

[4]Federal Power Commission, First Annual Report, Washington, Government Printing Office, 1921, p. 43.

[5]Hamele, Ottamar, and O'Hara, James J., Joint Memorandum for Mr. Stetson (undated manuscript).

"The following are a few of many cases bearing upon this right; *Van Brocklin v. Tenn.* 117 U. S. 151; *Hallowell v. U. S.,* 221 U. S. 324; *Utah Power etc. Co. v. U. S.,* 230 Fed 336;*Scott v. Sanford,* 19 How. 612; *Pollard v. Hagan,* 3 How. 212; *Illinois Central Railroad Co. v. Illinois,* 146 U. S. 434;*Ableman v. Booth,* 21 How. 525; *Permoli v. First Municipality,* 3 How. 609; *McKinney v. Saviego,* 18 How. 240; *Cummings v. Missouri,* 4 Wall. 319; *Ward v. Race Horse,* 163 U. S. 514; *Coyle v. Smith,* 221 U. S. 559; *U. S. v. Sandoval,* 231 U. S. 28." Point Memorandum for Mr. Stetson.

[6]Hamele, Ottamar, Hearings, H. R. 2903, Part V, p. 886, March 25, 1924. "I find nothing in the Act (Colorado River Commission Act of August 19, 1921, Public No. 56, 67th Congress which can be considered as authorizing any surrender by the United States of any jurisdiction it may have over the river as a navigable water of the United States, or of any rights which the United States may have as owner of the public lands and reservations through which the river runs. On the contrary, the Act expressly provides for a representative to be appointed by the President 'for the protection of the interests of the United States,' and the jurisdiction of the Commission is limited to the negotiation of a compact or agreement between the several States for the settlement of their conflicting claims, which shall not be binding 'until the same shall have been approved by the legislature of each of said States and by the Congress of the United States'."—Call, Lewis W., Chief Counsel, Federal Power Commission, Memorandum for the Executive Secretary of the Federal Power Commission, Washington, Feb. 1, 1922.

[7]For a statement showing the area of land unappropriated and unreserved on July 1, 1924, in the seven states immediately concerned in the Colorado River Compact, see Vacant Public Lands on July 1, 1924, Circular No. 959, Department of the Interior, General Land Office, Washington, D. C., July 1, 1924, pp. 3, 4-7, 15-16, 19-20.

For information concerning the irrigable area of public land included in various irrigation projects, see Statistics from the Twenty-third Annual Report (pamphlet) Department of the Interior, Bureau of Reclamation, Washington, Government Printing Office, 1924, 21451-24-1.

National forest areas on June 30, 1924, may be located by reference to National Forest Areas, June 30, 1924, United States Department of Agriculture, Forest Service, William B. Greeley, Forester, Compiled by the Branch of Engineering, Washington, Government Printing Office, 1924, Misc. 0-11.

[8]Shields, John Franklin, The Federal Power Act. 73 University of Pennsylvania Law Review and American Law Register, 142, 149. January, 1925.

Mr. Shields cites the cases of *McCulloch v. Maryland,* 4 Wheaton, 316, 423, and *United States v. Joint Traffic Association,* 171 U. S., 505, in support of his statement. The words of *McCulloch v. Maryland* are as follows:

"Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribual, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

[9]"Such title (to the shore and lands under water) being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce." *Hardin v. Jordan,* 140 U. S., 371, quoted in *Kansas v. Colorado,* 206 U. S., 46, 94.

Legal Control of Aerial Navigation

By MEREDITH PERRY GILPATRICK, *University of Southern California Law School*

One need no longer be a prophet, or the son of a prophet, to know that the air is upon us. Nor need one have the imagination of a Herbert Quick[1] to realize that the Wright brothers have released a host of new legal troubles upon us. Will the common law retain the elasticity of Para rubber and meet this new situation, or must we have new declaratory legislation? Will aeroplanes flying over foreign states enjoy extra-territorial privileges? Is air free, or is it national property? These and a host of other questions at once arise.

The World War effectively silenced demands for freedom of the air. At Paris in 1919 twenty-two contracting states entered into an International Flying Convention which declared "every Power has complete and exclusive sovereignity over the air space above its territory," colonies, and littoral waters.[2] Thus an aircraft flying above another state is subject to that state's jurisdiction, both as to acts aboard the craft as well as acts toward persons or property outside. All extra-territorial right of a foreign machine is denied. But when an aircraft passes over high-seas it reverts to control of the state of its nationality on the theory that space above high-seas and unoccupied territory is *res nullius* and that, therefore, by analogy to a vessel on the ocean, jurisdiction would be in the nation of registry. The theory of the sovereignity of the state over the air space as thus worked out should recommend itself to American jurists, both because it is consonont with the dignity of modern states and in accordance with principles of common law that abhor extra-territorial rights, but even more because it gives a basis of certainty on which the legislature and courts may approach the problem of control of aerial navigation.

The problem is unique because aerial flight on close inspection bears far less resemblance to ocean transportation than one might suppose. The differences between them are threefold: first, all bodies in the air are tangent to the land due to the law of gravity, which is not true of ocean going vessels; second, the indispensability of air to human life renders the protection of the air space of the surface occupant of the land imperative; third, due to straight line routes of aeroplanes, the right of passage over adjacent foreign territory becomes of great practical importance. Today, for example, French planes flying from Paris to Prague and Constantinople must detour over the Alps via Basle rather than fly across Bavaria because the German government refuses to grant them passage over German territory.

To meet these difficulties twenty-two of the Allied and associate powers (among which Grmany was not one) entered into the International Flying Convention already referred to whereby the signatory powers granted to each other the right of innocent passage above their territory in time of peace.[3] National regulations as to innocent passage were to apply uniformly to all of the contracting powers;[4] each state could prohibit flight over certain designated areas;[5] aircraft should be certified as to airworthiness and pilots licensed by the country of the craft's nationality;[6] use of wireless equipment must be licensed;[7] carriage of explosives, arms, and photographic apparatus was prohibited;[8] and aircraft crossing another state must follow the air-routes prescribed by the state.[9] In the event of disagreement between two states as to the interpretation of the Convention, the dispute shall be settled by the Permanent Court of International Justice of the League of Nations.[10] The United States has never ratified this convention of 1919 so that our citizens have no right to fly over the territory of the signatory powers, such as Canada, Great Britain, France, etc., except by temporary and special license.[11]

[1]Author of *Virginia of the Air-Lanes*, a novel turning on the question of whether flying over land is a traspass.

[2]Art. I of Convention, published by Secretariat of Commission on International Air Navigation, No. 20 Av. Kleber, Paris.

[3]International Air Navigation Convention, 1919, Art. 2.

[4]Ibid., Art. .

[5]Ibid., Art. 3.

[6]Ibid., Art. 11, 12, 13.

[7]Ibid., Art. 14.

[8]International Air Navigation Convention, 1919, Art. 26, 27.

[9]Ibid., Art. 15.

[10]Ibid., Art. 37

[11]Ibid., Art. 5.

These articles are followed by elaborate annexes fixing standard markings for planes, aerodromes, wireless and meterological codes, etc.

The Convention of 1919, however, is subject to two general criticisms. First, it treats the right of innocent passage over neighboring territory in time of peace not as an inalienable human right but as a matter of grant by treaty. Thus, land-locked states such as Switzerland, Austria, Hungary, Czecho-Slovakia, Poland, Bolivia, etc., possess a right to aerial ingress and egress only by grace of their powerful neighbors. That the weak states shall hold their legal rights to the air subject to the control of the strong states, is an eminently unsatisfactory situation and in contravention of the theory of comity between nations.[12] The ideal conception of the international jurist that the sovereignty of the state over the air should depend upon whether the state was at peace or at war, and thus admit of the right of innocent passage in times of peace as a matter of comity between nations, has not found favor in the realm of practical politics.[13]

The second criticism of the Convention of 1919 centers around the question of how far a state may go in prescribing air-lanes that foreign craft must follow in traversing its territory. Surely a state should have no right to prevent the aeronaut from utilizing known air currents that are as well defined as are the Japanese and Gulf Stream in the ocean, and of even greater importance to the navigator of the air than are the currents mentioned important to the captain on the sea. Witness the six hours saving in time which the British dirigible R-34 made on its return journey from New York to London as compared with its outward voyage, due to the fact that it was travelling with the prevailing westerly winds. We have the authority of the eminent meterologist Alexander McAdie that an aeroplane can gain 50 per cent in speed by flying with one of these air currents, as compared with only 25 per cent increase in speed which a vessel can gain in the strongest ocean current.[14] Further, a state ought to have the right to require that foreign planes fly over high ranges of mountains when there is a shorter and safer route over low-lands. Within the foregoing limits, however, everyone will concede that a state should have the

[12]Blewett Lee, International Flying Convention of 1919, 33 Harv. L. R. 23. (1919)
[13]Hyde, International Law, p. 325, Vol. 1.
[14]Alexander McAdie, "Freedom of the Skies," *Scientific American*, July 26, 1919.

right to prescribe national air-highways to be followed by its citizens and foreigners alike.

The question now arises as to the relation which a landowner's private property in the air above him bears to the sovereignty of the state. Does Coke's maxim *"Cujus est solem, ejus usque ad coelum"* give the landlord title to the air above his property out to infinity? Clearly so to hold would mean bankruptcy for the aeroplane corporations. But let us see if such has ever been the meaning of the common law with respect to real estate. In 1815 Lord Ellenborough refused to hold a board overhanging a garden to be a trespass, because he opined it would follow that an aeronaut passing overhead would be liable for trespass *quare clausum fregit*.[15] American decisions have uniformly held interference with the air space near the ground,[16] or by tunnelling 150 feet beneath the surface[17] constituted a wrong against the occupant of the surface, but we have no cases to the effect that it is a wrong against the landowner to intrude over his land at such height as not to affect the surface use in the slightest degree. Thus we must conclude that at common law the passage of aircraft at such height above the property as not materially to disturb its use by the surface occupant is not a trespess and that Coke's maxim expressed a medieval theory rather than a legal fact.

That this view is consonant with common sense is evinced by the fact that it is embodied in the German Civil Code of 1896, No. 905, providing that a landowner "cannot prohibit interferences which take place at such height or depth that he has no interest in the exclusion," [18] and by the additional fact that provision has been made in all proposed codes for other countries that land be subject to the right of passage by aircraft. Nor will California Civil Code, Section 829, providing, "The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it," prohibit innocent passage of aircraft, inasmuch as this section entitles a landowner only "to everything *permanently* situated . . . . . above it." Momentary transit by an aeroplane patently is not included within these terms. On the other hand, aircraft have no more right to hover over a given spot and observe the operations of the surface occupants than have pedestrians to loiter on the highway and observe the people in the adjoining field. Provision to that effect should be made in any comprehensive aerial code we may frame, for a surface occupant has the right not to have great weight suspended over his head unnecessarily or for prolonged intervals. Thus it is conceivable that while mere passage at great heights would not be trespass against the landowner, repetition of the passage or hovering would constitute a nuisance which could be enjoined.

This brings us to the question of liability of an aeronaut to the surface inhabitant; (a) as to voluntary damage and (b) involuntary damage. In the first instance everyone will grant that the aviator is liable. Perhaps courts have gone too far though in holding certain acts as voluntary, such as the descent of a ballonist, because it was foreseeable he could not control his descent.[19] But in the second instance, to impose liability upon an aeronaut without fault on his part seems inequitable. On the other hand, the landsman is helpless against accidentally dropped monkey wrenches and oil-cans, unless he carry a steel umbrella, a precaution that the law will probably not require for some time to come. But to restrict the landsman's recovery to cases of proved negligence would be to leave him practically remediless, since both pilot and the machine are usually destroyed in the fall. Can we say that the public importance of the development of aeronautics is such as to warrant the sacrifice of life and property without compensation in instances of unavoidable accidents? To state the question is to answer it. France, Belgium, and England [20] impose absolute liability upon the aviator regardless of whether damage was caused by negligence or unavoidable accident. The states of the Union are divided on this point, Massachusetts imposing liability only where there is failure to take all possible precautions.[21] Connecticut adopts the Fletcher V. Rylands rule that an aviator flys at his peril,[22] while Wisconsin seems to hold that a spectator in a grandstand has assumed the risk of a non-negligent aeroplane falling on him, and therefore cannot recover.[23] As the Air Commerce Act of 1926 [24] recently passed

[15]Pickering v. Rudd, 4 Camp. 219 (1815).
[16]*Butler v. Frontier Tel. Co.* 186 N. Y. 486 (1906). Ejectment will lie for wire within 30 feet of ground.
[17]*Matter of Wilcox*, 213 N. Y. 218 (1914).
[18]*Matter of City of N. Y.*, 215 N. Y. 109 (1915). Loewy Transl.
[19]Guille v. Swan, 19 Johns (N. Y.) 381-1822. Holding ballonist liable for trespasses of crowd that gathered to aid him.
[20]Air Navigation Act 1910, 1 & 2 Geo. 5 c. 4. Air Navigation Act 1920, 10 & 11 Geo. 5 c. 80.
[21]Mass. Acts 1919, Ch. 306.
[22]Conn. Gen. St. 1918, Ch. 176.
[23]*Morrison v. MacLaren et al.*, 152 N. W. 475 (1915).
[24]Publications of 69th Congress, No. 254, Appendix.

by Congress and the International Flying Convention of 1919 are silent as to the aeronaut's liability to the land occupant or pedestrian, this matter remains a question of individual legislation by each state or nation.

But immediately we are presented with the question as to whether federal legislation would not be more desirable. In view of the desideratum of uniformity, yes; but in view of our dual form of government, where Federal Government only has delegated power and where common law exists only under the states, no. The present 69th Congress, in response to the demand for federal legislation regulating aviation, passed the Air Commerce Act of 1926, requiring licensing and inspection of all aircraft and pilots engaged in interstate commerce, that is, carriage of persons of goods for hire between states. The Department of Commerce was empowered to provide tests to determine airworthiness of craft, and examinations to ascertain knowledge and ability of pilots, mechanics, and aerodrome hands. The Secretary of Commerce was given power to prescribe national air-highways, fix standard plane markings, wireless, and meterological signals, etc. Arrival and clearance of aeroplane for foreign countries were declared to be subject to the law of admiralty. That such regulations were necessary is shown by the list of 112 accidents, of which 83 were fatal, during the year 1926. Of these accidents 34 were due to error in piloting, 28 to mechanical defects in plane or engine, 25 to stunting, the remainder being attributed to unknown causes. The Act, however, does not purport to regulate all air traffic, but merely interstate flying over highways designated by the Secretary of Commerce, acrobatic and stunt flying being regulated by other federal statutes and limited to restricted areas.

Thus intrastate flight together with all topics not covered by Acts of Congress as to interstate flight remain subject to piece-meal legislation by the states, of which we already have an abundance. In 1919 both California[25] and Michigan prohibited hunting from aeroplane; New York legalized insurance against loss occasioned by or to planes;[26] Texas authorized formation of corporations to build and operate aeroplanes;[27] while Washington and Wisconsin granted the right to condemn land for aviation purposes to cities and county park commissioner's respectively.[28] To attempt to formulate a comprehensive aerial code both for state and federal government at this time would be premature, as we need several years more experience to ascertain the true needs and requirements of commercial aviation. But the fact that for the time being we must meet each individual problem as it arises until we have established a body of principles that we codify, is no excuse for every state not to immediately settle by legislation the degree of liability of an aeronaut to the landsman and his property, and to his passenger.

What duty the aviator owes his passenger brings up a whole new problem that cannot be treated in this brief paper. Liability of aviator to his passengers, however, at once raises the query whether an aeroplane is a common carrier, which status the courts have so far refused to concede.[29] That this is the logical next step in the development of aerial law is indicated from the recent dedication of Cleveland's million dollar Municipal Air Field, and the nation-wide organization of air corporations such as Colonial Air Transport Company, and Western Air Express, Inc., operating respectively in the eastern states, Mississippi Valley, and western states. That the courts can, in the light of these facts, and in view of the increasing safety of aerial navigation, long deny to aircraft the status of common carrier alongside the railway train and steamship does not seem plausible. Thus the law will extend its regulatory power over the air, and determine right and liability in all things as it has done over the circle of the earth.

[25]Cal. L. 1919, Ch. 300.
[26]N. Y. L. 1919, Ch. 391-393.
[27]Texas L. 1919, Ch. 9.
[28]Wash. L. 1919, Ch. 48. Wis. L. 1919, Ch. 613.
[29]*North American Accident Ins. Co. v. Pitts*, 104 So. 21 (1925).
Brown v. Pacific Life Ins. Co., 8 Fed. 2sd 996 (1925).

Special announcements by law firms of new locations and new associations are most effectively made to the profession through the pages of the BULLETIN. *In addition, such announcements serve as a manifestation of good-will toward and co-operation with the* BULLETIN *in its program of constructive endeavor for the welfare of the Bar Association.*

The President's Page

Fellow Members Los Angeles Bar Association:

I am more than delighted to report to you that with the aid of Governor Young, members of Los Angeles County delegation in the legislature, and many others, more substantial and constructive legislation has been accomplished at Sacramento by Bar Association forces than at any previous legislative session.

At the head of the list stands the passage of the State Bar Bill for which California Bar Association has labored for a number of years. Incorporation of the bar will not be a panacea for all our ills but it will have the immediate far-reaching effect of conferring upon each member of the bar the privilege of participation in bar association endeavors and the obligation of bearing his proportionate part of his professional responsibility. Bar incorporation will furnish the means of doing in a thorough and business-like manner what has been inadequately attempted by volunteer organizations. It will also furnish an authoritative medium of expression of the sentiment of the bar as a whole regarding matters affecting procedural and other reforms. The legally organized bar co-operating with the recently created judicial council will rapidly accomplish those changes in the conduct of the business of courts that the public have long demanded.

The importance of Assembly Bill No. 43 providing for the segregation of judicial candidacies cannot be over-estimated. This measure will require each candidate to run for a specific department, just as is done at the present time under the Municipal Court law. Judges admittedly qualified and who have done good work will, in most cases, be unopposed, thus guaranteeing continuous tenure to good judges. Where a judge fails to measure up to proper qualifications, he can, under this law, be easily repealed. The beneficial operation of this statute was strikingly demonstrated in recent elections both in Los Angeles and in Long Beach.

Other measures of great importance were those materially increasing the salaries of judges. The logical effect of these increases will be to attract and keep better qualified judges on the bench.

The addition of ten new judges to the bench of Los Angeles County was a matter of vital consequence to this community. Los Angeles County has 41% of all the Superior Court cases in the state. It had prior to this addition but 22% of the judges.

Another noteworthy measure sponsored by the Bar Association is that providing for the printing upon tax bills notices of special assessments, and the extension of the time within which foreclosure proceedings may be brought, and also providing for attorney's fees for the property owner and other penalties where notices of assessment and service of summons are not given and make in accordance with the statute.

A considerable number of other statutes making certain commercial laws uniform with other states, and simplifying practice and procedure in important particulars, were adopted, and many of them have already been signed by the Governor.

I think it only fair to express to Governor Young our gratitude to him for his confidence in the ideals and purposes of the Bar Association as evidenced by his approval of these various measures. We should be especially grateful for his advocacy and approval of the State Bar Bill, the increase in salaries of the judges of Los Angeles County and for the increase in the number of judges in this county.

Among those who went to Sacramento from Los Angeles in aid of various Bar Association measures are: Thomas C. Ridgway, Alfred L. Bartlett, Leonard B. Slosson, Judge Harry Hollzer, Judge John R. Fleming, Wm. J. Hunsaker, James A. Anderson, Everett W. Mattoon, Judge Elias V. Rosenkranz, and Harold Cragin. To all these men, and many others, great credit is due for their untiring and effective efforts.

Committees

In answer to a call for volunters, over five hundred members of the Association offered to serve on various committees during the present year. The fact that over two hundred members of the Association volunteered for Grievance Committee work indicates that there is an earnest desire on the part of the bar to co-operate in raising the standards of the profession. While this was very gratifying it was obviously impossible for the President to appoint all of these members to a place upon a committee of nine. I desire to explain that on account of the fact that the old committee had cleaned up its calendar, consisting of some eighty pending matters, and because a large number of new complaints had been filed,

it was necessary to make appointments to the Grievance Committee immediately. However, under the plan which I have recommended and which has been adopted, a considerable number of those who volunteered to serve in grievance matters have been asked to take assignments in connection with this work. As complaints come in they will be assigned to "Examiners" who will investigate and definitely report to the Grievance Committee, and will, in the event of hearings, act as prosecutors. The departments of the Grievance Committee have been increased to four, and sessions of all four departments will be held every Monday night, and oftener if required.

It was impossible to place each member of the Association upon a committee of his first choice, but every member who indicated a desire to serve has been given some active work to do. Already many of the 26 committees have had meetings and have definitely outlined their work for the ensuing year.

I have requested the Editor of the *BULLETIN* to attend all meetings of committees and to report the results of the meetings in the *BULLETIN*.

to attend all meetings of committees and to

Among the new activities of the Association are the formation of sections on criminal law and procedure and civil procedure. A large number of our members evidenced an interest in these two fields and I am hopeful that all of our members so interested will participate in the studies and investigations to be inaugurated by these newly created sections of the Association. The plan is to have regular monthly meetings, affording opportunity for discussion of proposed reforms that are occupying the attention of lawyers throughout the country.

PROGRAMS

We desire to receive the constructive suggestions of members with respect to programs. I hope to send out a questionaire which will elicit the advice of members in this regard. I think we shall agree that while we have had papers presented of extraordinarly high quality, some of them have consumed too much time in delivery and some means should be adopted to enforce a rigid limitation upon time of presentation. There may be other features that could profitably be added to our programs. The Program Committee will be glad to receive suggestions as to topics, speakers and other features for future programs.

We have no doubt, however, as to the quality of the next three programs to be offered. On the 24th of this month we shall have the pleasure and honor of entertaining Dr. W. S. Holdsworth, Vinerian Professor of English Law at Oxford, who will address the Association on the subject of "Dickens as a Lawyer." Early in July we shall have as our guest Dean Roscoe Pound of Harvard. Dean Pound and Dr. Holdsworth are the two leading teachers of law in England and America, and we are indeed fortunate to secure their presence.

KEMPER CAMPBELL.

Doings of the Committees

PUBLICITY COMMITTEE

The Publicity Committee of the Los Angeles Bar Association held their first meeting Friday, May 6, at Arthur Eckman's law office in the Story Building. A full attendance was had.

This committee consists of Arthur Eckman, Chairman, Maurice Saeta, Vice-Chairman, Chas. B. Hazlehurst, Secretary, C. O. Bacon, Sol A. Rehart, C. P. Von Herzen, John R. Moore, Harold A. Fendler and William Christensen.

An active program of publicity was outlined, by which it is planned to utilize the press, radio and other mediums. The committee is making arrangements to have a press table at each Bar Association banquet. Arrangements are also being made to have feature newspaper writers cover the Bar meetings.

The Publicity Committee expects to draft members of the Speakers and Organizations Committee and others for radio talks. About 300 Los Angeles lawyers are going to be requested to write short and intimate stories concerning California judges, lawyers and cases, exemplifying the activities and the ideals of the profession.

This is one committee that is functioning one hundred per cent, and great results are expected.

Respectfully submitted,

CHAS. B. HAZELHURST,
Secretary.

BULLETIN COMMITTEE

A meeting of the Bulletin Committee was held on the evening of April 26, at the call of the chairman, with Chairman Ellis, Messrs. Beardsley, Saeta, McDaniel and Jones of the committee, and Editor Nichols and Associate Editor Purdue of the BAR ASSOCIATION BULLETIN present. A report was made by Mr. Nichols in reference to the establishment, development, financing and plan of operation of the BULLETIN. This disclosed that the BULLETIN was more than self-supporting during the first year of its publication, and had increased from four pages to its present size of thirty-two pages. A general discussion followed during which the committee expressed itself as feeling the BULLETIN in its present form was very satisfactory. The committee felt it could best help the editors by aiding in obtaining worth-while articles from members of the bar, and by encouraging the placing of advertisements in the BULLETIN. It was felt that much benefit could be obtained by advertisers through the use of the BULLETIN, and steps were taken to procure more advertising contracts. This is a movement in which every member of the Association may participate through their patronage of the advertisers, thus convincing the latter that the BULLETIN is a successful advertising medium.

Respectfully submitted,
PAUL W. JONES,
Secretary.

REPORT ON JUDICIARY CAMPAIGN OF 1927

PERSONAL LETTERS mailed from attorneys to their clients and from heads of organizations to their friends—53,000

TABLOID PAPER.

Distributed to every house in L. A. and municipality April 30th—266,000.

Distributed at political meetings—10,000.

PAMPHLETS—140,000.

Mailed in letters—53,000.

Balance distributed through churches and Y. M. C. A.

SMALL BAR TICKET—100,000.

Distributed through pay envelopes of mercantile houses.

ONE-SHEETS—9,000.

Distributed on sign boards and fences throughout the city last four weeks of campaign.

NEWSPAPER PUBLICITY. Separate Bar stories during campaign—860.

Advertising. Two columns, ten inches, in all daily papers; proportionate amount in magazines and small community papers.

CLUBS AND ORGANIZATIONS CONTACTED Endorsements secured from the heads of over 700 organizations.

SPEAKERS Judges and speakers of Bar ticket placed at 1,232 meetings.

PRECINCT WORK ON DAY OF ELECTION Thirty-five volunteers from University of Southern California; forty from Southwestern; twelve paid disabled veterans; eleven office workers.

COMPLETE TICKET, TWENTY-THREE JUDGES, ELECTED AT PRIMARIES

ALFRED BARTLETT
LEONARD B. SLOSSON
LAWRENCE L. LARRABEE
Campaign Committee

ROSALIND BATES,
Executive Secretary

On the President's page, you will note the announcement that,

"On the 24th of this month we shall have the pleasure and honor of entertaining Dr. W. S. Holdsworth, Vinerian Professor of English Law at Oxford, who will address the Association on the subject of "Dickens as a Lawyer."

Early in July we shall have as our guest Dean Roscoe Pound of Harvard. Dean Pound and Dr. Holdsworth are the two leading teachers of law in England and America, and we are indeed fortunate to secure their presence."

Patent Office Procedure Simplified

By G. E. CHASE

In charge of Patents Room, Los Angeles Public Library

Changes which will lessen the time required in obtaining the grant of patents and a simplification of the procedure in the Patent Office and the courts with a decided decrease in expense to the inventor are among the benefits conferred upon the public by the last session of Congress in the passing of Legislation for the improvment of our patent laws. The present changes in the law were indorsed by the American Bar Association and are praised by the legal fraternity in general.

One of the most important changes made by the new law and effective early in May of this year is the requirement that amendments must be filed by the inventor within six months following an action by an examiner. By so shortening the period, which was formerly one year, society will benefit to the extent that manufacturers will be informed of the trend of inventions in which they are interested with reasonable promptness. Under the former regulations many industries have suffered discouraging experiences of expensive litigation forced upon manufacturers by the grant of a controlling patent which the owner withheld from issue until his competitor had gone too far in his investment in plant and equipment to withdraw until the aid of the courts had been invoked. The history of the Selden patent for motor vehicles is probably the best known example of delayed action.

An increase in the number of members of the Board of Appeals will render the work of the Patent Office much more efficient. In addition to this, one of the appeals formerly allowed to the commissioner in person has been abolished and the right given to the inventor to carry his case from the Board of Appeals direct to the Federal Courts.

A great advance has been made in the interference practice in that, in addition to eliminating one appeal in the Patent Office, the final appeal carries the interference into the Federal Courts where the case may be presented on the same printed record that was used in the Patent Office, supplemented by further evidence which may be taken before the court if such is desired.

Hereafter the public will be benefited by the knowledge obtained from the marking of patented articles with the number of the patent instead of with the date as has been the rule for many years. This change will enable one interested to locate a patent in the Official Gazette quickly and accurately.

After April 14, 1927 one dollar extra will be charged for each claim over twenty in registering a patent and the same advance in charges will be made in the final fee when the patent is granted. Incidentally the price of the subscription to the Official Gazette was raised from five dollars to ten dollars per annum on March 1, 1927.

In reference to the different bills passed, great credit is due to the excellent work of Thomas E. Robertson, Commissioner of Patents, who with his staff of examiners has accomplished the overwhelming task of bringing the work of the Patent Office nearly back to normal within the two years following the war.

It is expected that the new laws will facilitate the granting of patents and thus shorten the time in which improved manufactured articles are placed on the market.

Case Notes*

WILLIAM E. BURBY *of the Los Angeles Bar*
Professor of Law, University of Southern California

LABOR COMBINATIONS IN RESTRAINT OF INTER-STATE COMMERCE

We have been told that Justices Holmes and Brandeis are familiar figures to most Washington residents as a result of ther walks together through the streets and parks. But whatever their mutual interests may be during moments of relaxation from the arduous and exacting duties of an overcrowded calendar of official business, certain it is that these two members of the Supreme Court often "walk together" in many an opinion of that body. One of the most recent instances of this was their dissent in *Bedford Cut Stone Co., et al. v. Journeymen Stone Cutters' Ass'n. of North America, et al.*, 47 Sup. Ct. Rep. 522.

In that case Bedford Cut Stone Co., and 23 others, all, with one or two exceptions, Indiana corporations, were in the business of quarrying or fabricating, or both quarrying and fabricating, Indiana limestone, in what is called the Bedford-Bloomington district in the State of Indiana. Their combined investment was about $6,000,000, and their annual aggregate sales amounted to about $15,000,000, more than 75% of which were made in interstate commerce to customers outside the State of Indiana. The Journeymen Stone Cutters' Association of North America, referred to as the "General Union," is an association of mechanics engaged in stone-cutting trade. It has a constitution, by-laws, and officers, and an income derived from assessments upon its members. Its principal headquarters are in Indiana, and it has a membership of about 5,000, divided into over 150 local unions located in various states and in Canada; each of such local unions having its own by-laws, officers, and income derived from assessments. By virtue of its membership, each member of these local unions is a member of the General Union. The members of the General Union and allied locals throughout the United States are stone cutters, carvers, curb-cutters, curb-setters, bridge cutters, planermen, lathemen, and carborundum moulding machine operators, engaged in the cutting, patching, and fabricating of all natural and artificial stones; and the General Union claims jurisdiction over all of them.

The constitution of the Journeymen Stone Cutters' Association provides: "No member of this association shall cut, carve, or fit any material that has been made or cut by men working in opposition to this association." For many years the petitioners had contracts with the association under which its members were employed at their several quarries and works. In 1921 the petitioners refused to renew the contracts because certain rules or conditions imposed by the journeymen were unacceptable. Then came a strike. It was followed by a lockout, the organization by the petitioners of a so-called independent union, and the establishment of it at their plants. Repeated efforts to adjust the controversy proved futile. Finally the association urged its members working on buildings in other states to observe the above provision of its constitution. Its position was: "That, if employers will not employ our members in one place, we will decline to work for them in another, or to finish any work that has been started or partly completed by men these employers are using to combat our organization."

The present suit was brought by petitioners against the General Union and some of its officers, and a number of affiliated local unions and some of their officers, to enjoin them from combining and conspiring together to commit, and from committing, various acts in restraint of interstate commerce in violation of the federal Anti-Trust Act, c. 647, 26 Stat. 209 (Comp. St. par. 8820 et seq.) and to petitioners' great and irreparable damage. The trial

*EDITOR'S NOTES The BULLETIN will be pleased to accept for publication reviews of, and comments on, recent decisions, and members of the bar are urged to co-operate with Mr. Burby in effectuating the maintaining of *Case Notes* as a noteworthy feature of the BULLETIN. Reviews should be mailed to the office of Mr. Burby, 3660 University Avenue.

court dismissed the bill. The United States Circuit Court of Appeals affirmed the decree, stating: "After long negotiations and failure to reach a new working agreement, the union officers ordered that none of its members should further cut stone which had already been partly cut by non-union labor, with the result that on certain jobs in different states stone cutters, who were members of the union, declined to do further cutting upon such stone. Where, as in some state, there were few or no local stone cutters, except such as belonged to the union, the completion of the buildings was more or less hindered by the order, the manifest object of which was to induce appellants to make a contract with the union for employment of only union stone cutters in the Indiana limestone district. It does not appear that the quarrying of stone, or sawing it into blocks, or any other building operation, was sought to be interfered with, and no actual or threatened violence appears, no picketing, no boycott, and nothing of that character."

Mr. Justice Sutherland, writing the majority opinion, reversed the decree of dismissal on the ground that, "The evidence makes plain that neither the General Union nor the locals had any grievance against any of the builders, local purchasers of the stone, or any other local grievance, and that the strikes were ordered and conducted for the sole purpose of preventing the use and, consequently, the sale and shipment in interstate commerce, of petitioners' product, in order, by threatening the loss or serious curtailment of their interstate market, to force petitioners to the alternative of coming to undesired terms with the members of the union." It was pointed out that the stone cutters, through their organization, deliberately adopted a course of conduct which directly and substantially curtailed, or threatened to curtail, the natural flow in interstate commerce of a very large proportion of the building limestone production of the entire country, to the probable grave disadvantage of producers, purchasers, and the public. Numerous cases were then cited to show that the Anti-Trust Act "directs itself against that dangerous probability as well as against the completed result."

The justices concurring in the controlling opinion regarded the case of *Duplex Co., v. Deering,* 254 U. S. 443, 468, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196, as an important precedent. That case was summarized in the instant case as one in which the court held that complainant's business of manufacturing presses and disposing of them in commerce was a property right entitled to be protected against unlawful injury or interference, that unrestrained access to the channels of interstate commerce was necessary for the successful conduct of that business, and that the combination to hinder and obstruct such commerce through the means indicated was in violation of the Sherman Anti-Trust Act, as amended by the Clayton Act (38 Stat. 730). The combination was held to constitute a "secondary boycott," defined as: "A combination not merely to refrain from dealing with complainant or to advise or by peaceful means persuade complainant's customers to refrain (primary boycott), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it." Mr. Justice Sutherland found that the motive of the organized stone cutters was to restrain the interstate sale and shipment of the commodity concerned. His discussion on this point is as follows: The product against which the strikes were directed, it is true, had come to rest in the responsible localities to which it had been shipped, so that it had ceased to be a subject of interstate commerce *(Industrial Ass'n. v. U. S.,* 268 U. S. 64, 78, 45 S. Ct. 403, 69 L. Ed. 849); and interferences for a purely local object with its use, with no intention, express or implied, to restrain interstate commerce, it may be assumed, would not have been a violation of the Anti-Trust Act. But these interferences were not thus in pursuit of a local motive—they had for their primary aim restraint of the interstate sale and shipment of the commodity. Interstate commerce was the direct object of attack, "for the sake of which the several specific acts and courses of conduct were done and adopted." And the restraint of such commerce was the necessary consequence of the acts and conduct and the immediate end in view. Prevention of the use of petitioners' product, which, without more, might have been a purely local matter, therefore, was only a part of a conspiracy, which must be construed as an entirety; and, when so regarded, the local transactions became a part of the general plan and purpose to destroy or narrow petitioners' interstate trade. In other words, strikes against the local use of the product were simply the means adopted to effect the unlawful restraint. And it is this result, not the means devised to secure it, which gives character to the conspiracy." The language just quoted will be the subject of comment in a later portion of this note. It is to be noted

that the opinion did not overlook the possibility of their being, in the minds of the organized laborers, another purpose than that of restricting interstate commerce. That the stone cutters might have organized "for the purpose of redressing alleged grievances of their fellow craftsmen or of protecting themselves or their organizations," and further, "any suggestion that such concerted action here may be justified as a necessary defensive measure is completely answered by the words of this court in *Eastern States Lumber Ass'n. v. U. S.*, 234 U. S. 600: 'Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted.'"

It is evident from the preceding paragraphs that the leading opinion is predicted upon the belief that restraint of the interstate sale and shipment of the commodity was the primary aim or motive of the Stone Cutters' Association. The language used, however, directs our attention to the result of the application of the rules of the union. If "character" is given to the conspiracy by the "result" of the acts sought to be enjoined, it is not particularly helpful to place emphasis upon the motives or primary aims of the association. Whatever be the motives of that organization, its acts will not have the "character" of acts unduly restraining interstate commerce unless the results show, as a matter of fact, that interstate commerce is unduly restrained. It is certainly going a long way to say that the primary aim of the members of the Journeymen Stone Cutters' Association was to restrict interstate commerce. It would be more nearly in line with the facts to say that they did not think anything about interstate commerce, or the restraint thereof. The maintenance of so-called adequate wages was undoubtedly their "primary aim."

These considerations indicate the real issue in the case. Were the acts of the members of the association an unlawful restraint of interstate commerce? Mr. Justice Brandeis, with whom Mr. Justice Holmes concurred, thought not. "What is (a) reasonable (restraint) must be determined by the application of principles of the common law, as administered in federal courts, unaffected by state legislation or decisions. Compare *Duplex Printing Co. v. Deering* (supra). Tested by these principles, the propriety of the union's conduct can hardly be doubted by one who believes in the organization of labor."

Mr. Justice Brandeis points out that the case at bar involved simply refraining from work, whereas in the Duplex case the facts established numerous affirmative acts such as threatening and warning customers, inciting strikes, and instituting a general boycott, not only of the business of the employer, but the business of all who should participate in the marketing, installation, or exhibition of its product. The boycott in the Duplex case was to be effected, not by the co-operation merely of the few members of the craft interested in the trade dispute, but by the aid of the vast forces of organized labor affiliated with them through the American Federation of Labor. A single paragraph will serve to indicate the point of view of the dissenting justices. "The manner in which these individual stone cutters exercised their asserted right to perform their union duty by refusing to finish stones 'cut by men working in opposition to' the association was confessedly legal. They were innocent alike of trespass and breach of contract. They did not picket. They refrained from violence, intimidation, fraud, and threats. They refrained from obstructing otherwise either the plaintiffs or their customers in attempts to secure other help. They did not plan a boycott against any of the plaintiffs or against builders who used the plaintiff's product. On the contrary, they expressed entire willingness to cut and finish anywhere, any stone quarried by any of the plaintiffs, except such stone as had been partially 'cut by men working in opposition to' the association. A large part of the plaintiff's product consisting of blocks, slabs, and sawed work was not affected by the order of the union officials. The individual stone cutter was thus clearly with his fellow craftsmen to refrain from working on the 'scab' cut stone because it was an article of interstate commerce.—If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Act and the Clayton Act an instrument for imposing restraints upon labor which reminds one of involuntary servitude."

R. L. OLSON.

COVENANTS RUNNING WITH THE LAND—EXTENT OF DUTY TO FENCE

A. conveyed a narrow strip of property to be used as a right of way by the defendant railroad company. In the deed was a covenant on the part of the vendee to construct and maintain "a good and substantial fence on each side of the said strip of land and right of way." A. later leased a portion of his property to the plaintiff, the land leased not immediately adjoining the said right of way. Mules owned by the plaintiff, escaped and, as a result of failure on the part of the defendant to fence, they entered upon the right of way and were killed. An action for damages based upon negligence could not be maintained due to the construction placed upon section 485 of the Civil Code before amended (St. 1915, p. 1281), this case arising prior to 1915. Plaintiff claimed right to recover on the theory that the covenant to fence contained in the deed was a covenant running with the land, and as lessee of a portion of the premises he claimed a right to avail himself of a breach. Held, for defendant. *Brenot v. Southern Pac. R. Co., et al.* (Dist. Ct. of Appeal, March 28, 1927), 52 Cal. App. Dec. 850.

In rendering its decision the court assumed, without deciding, that the covenant in question was one running with the land and that the plaintiff, as lessee, under ordinary circumstances, could avail himself of a breach. The decision was based upon the broad ground that the benefit of the covenant to fence attached only to that portion of the premises which immediately adjoined the right of way, and the plaintiff, not making out a case in this particular, was not entitled to recover.

It is submitted that the covenant in question was intended by the parties to be for the benefit of all that tract of land owned by the grantor through which the right of way was constructed. If the vendor's mules had been killed as a result of failure to properly maintain a fence, it would have been no defense that they were pastured in a portion of the premises not immediately adjoining the right of way. If, therefore, the covenant in question was intended by the parties to be for the benefit of the entire tract of land retained by the grantor through which the right of way was constructed (and this seems the only logical presumption under the circumstances) the question then arises as to whether or not the covenant in question is apportionable. That covenants running with the land, like easements, are apportionable seems to be generally conceded. "In the case of an easement, a right of way which is appurtenant to an estate is appurtenant to every part of it, no matter into how many parts it may be subdivided, and it inures to the benefit of the owners of all subdivisions *so situated that it can be used.*" 19 C. J. 948. "A covenant that runs with the land is divisible into as many parts or interests as the land itself may be divided into by subsequent successive conveyances, and the grantee

(Continued on page 29)

Book Reviews

By Harry Graham Balter *of the Los Angeles Bar*

Cyclopedia of Automobile Law; De Witt C. Blashfield; three volumes, XII and 3161 pages; 1927; Vernon Law Book Company, Kansas City, Mo., and West Publishing Company, St. Paul, Minn.

This is a new work and is full recognition of the growing conviction among law writers and members of the bar, that "automobile law" is now a field of law, worthy of recognition as a separate entity. The tremendous growth of the automobile industry and the increasingly diversified uses to which motor vehicles are now being put, have of necessity produced widely deversified questions of law connected with the industry.

Blashfield's *Cyclopedia of Automobile Law* is the latest attempt to give to the profession as comprehensive a work on the various legal matters connected with the manufacture, sale, use and regulation of the motor vehicle as is possible to produce. The three volumes cover every conceivable phase of the field. For that reason it is rather useless to enumerate the subjects discussed. Suffice it to remind the reader that "every conceivable phase of the field" does not mean only a discussion of principles of negligence and the time-worn doctrines connected with negligence, but means that the discussion cuts across many major fields of law such as Agency, Bailments, Bankruptcy, Bills and Notes, Carriers, Constitutional Law, Contracts, Corporations, Damages, Evidence, Highways, Insurance, Interstate Commerce, Judgments, Liens, Master and Servant, Negligence, Pleading and Practice, Public Utilities, Railroads, Sales, Taxation, Unfair Competition, etc.

The text is annotated throughout with decisions from every jurisdiction, which of course adds to the usefulness of the text. Mention should also be made of the elaborate and excellently arranged index.

Of particular interest to the trial lawyer are the five chapters devoted to, (1) Actions in General Based on Traffic Accidents (Chapter 67); (2) Pleading in Traffic Accident Cases (Chapter 68); (3) Evidence in Traffic Cases, (Chapter 69); (4) Sufficiency of Evidence, (Chapter 70); (5) Questions for jury (Chapter 71) and (6) Instructions to jury in Traffic Cases with forms (Chapter 72).

Even should all the other merits of the work be disregarded, this extended discussion of the very important phases of the conduct of a law suit arising out of a traffic accident, will no doubt go a long way to make this set of far greater value and practical use to the lawyer than the usual text book in this field.

Prohibition and Industrial Liquor; with Digest of Cases; George Cyrus Thorpe of the District of Columbia Bar; VII and 1165 pages; together with a "Prohibition Digest" by George Cyrus Thorpe and Palmer Canfield; 574 pages; 1926; Vernon Law Book Company, Kansas City, Mo., and West Publishing Company, St. Paul, Minn.

When a law attempts overnight to uproot age old personal habits, trouble is bound to result. The organic mandates of the Eighteenth Amendment and the still young Volstead Law will for a long time to come create difficult and complex legal niceties.

The criminal side of Prohibition is constantly before our eyes, but the permissive features of the act, particularly wtih reference to industrial liquor, we hardly notice.

The volume under review is an attempt to give to the practitioner a comprehensive work in this field, which will be complete and useful to those interested in the prosecution and defense of the criminal side of Prohibition, as well as to those who in increasing numbers will be called upon to concern themselves with the industrial phases of the Eighteenth Amendment.

The text consists of twelve parts dealing with, The Eighteenth Amendment, The National Prohibition Act, Enforcement of War Prohibition, Permanent National Prohibition, Some Matters of Criminal Law and Procedure Generally Applicable to Enforcement of Act, Industrial Alcohol, An Act Supplemental to the National Prohibition Act (Amendment of 1921), Regulations, Acts of Local or Special Application, Forms, Terminology of the Liquor Trade, and Organization of Enforcement Unit.

The Prohibition Digest consists of, Part I, Digest of Cases Construing National Prohibition Act, Part II, Regulations Amended, Part III, Statutes Relating to Intoxicating Liquors. The 144 page Index is exhaustive and commendably arranged with numerous

(Continued on page 28)

Additional 1927 Committee Assignments

In the issue of the BULLETIN of April 21 appeared a list of 1927 regular committee assignments of the Los Angeles Bar Association which included the following committees: Membership, Grievances, Legal Ethics, Judiciary, Courts of Inferior Jurisdiction, Constitutional Amendments, Criminal Law and Procedure, Legislation, Legal Education, Unlawful Practice of the Law, Publicity, and Meetings. To this list of regular committee assignments, the following are added:

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Richard A. Turner, Vice-Chairman
Shepard Mitchell, Secretary

A. H. Swallow	Ivan G. McDaniel
Lewis Cruickshank	Paul H. Bruns
E. W. Brewer, Jr.	Richard A. Turner

In addition to the assignments to the aforesaid regular committees, the following special committee assignments have been made:

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Phil M. Swaffield Vice-Chairman
Amelia F. Johnson, Secretary

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Russell H. Pray	M. D. Andrews
Kenneth Keeper	Olin Welborn III.
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L. R. Brighams
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C. A. Ballreich
Paul R. Cote
W. D. Mann
Geo. L. Greer
Theo. L. Hull
J. W. Morin
R. Morgan Galbreth
Marion P. Betty
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S. C. Schaefer
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D. A. Schweitzer
V. P. Showers
Spencer Ward
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Paul W. Jones
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Geo. Acret
Bertin A. Weyl
Henry M. Willis
E. J. Miller
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COLORADO RIVER DEVELOPMENT

(Continued from page 6)

asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. The standing of the United States in the suit was declared to be "not only to remove obstructions to interstate and foreign commerce, ... to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned," but, "it may be, also on the footing of an ultimate sovereign interest in the Lakes."[10] Whatever the phrase, "ultimate sovereign interest," may mean, it seemed to imply something different from any delegated authority to control the lakes for purposes of navigation and commerce.

It is also to be remembered that the national government is equipped with certain powers which have been designated as "the police power of the National Government" by the Chief Justice of the Supreme Court in the case of *Board of Trade v. Olson*. There it was held that it was within the power of Congress to require that both producers and shippers should be given an opportunity to take part in the transactions of the Chicago Board of Trade through chosen representatives, even though such participation was in violation of the rules established by the members of the Board of Trade. It was denied that the incidental effects which the reasonable rules of Congress might possibly have in lowering the value of memberships in the Board of Trade, did not constitute a taking (of property without due process of law), but were only a reasonable regulation in the exercise of the police power of the national government.[12] In the work of developing the Colorado River, therefore, it will be well to keep in mind the possibility of a claim being made for the exercise of federal authority on the basis of the police power of the federal government.

[10] *Sanitary District of Chicago v. United States*, 266 U. S., 405; Sup. Ct., 176, (Jan. 5, 1925).

[11] 262 U. S., 1, 41.

Taft, C. J. "In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the salse of futures upon interstate commerce, we find no difficulty under *Munn v. Illinois*, 94 U. S. 113, 133, and *Stafford v. Wallace*, supra, (258 U. S. 495) in concluding that the Chicago Board of Trade is engaged in a business affected with a public national interest and is subject to national regulation as such. Congress may, therefore, reasonably limit the rules governing its conduct with a view to preventing its operations. The incidental effect which such reasonable rules may have, if any, in lowering the value of memberships abuses and securing freedom from undue discrimination in does not constitute a taking, but is only a reasonable regulation in the exercise of the police power of the National Government. Congress evidently deems it helpful in the preservation of the vital function which such a board of trade exercises in interstate commerce in grain that producers and shippers should be given an opportunity to take part in the transactions in this world market through a chosen representative."

[12] *Board of Trade v. Olson*, 262, U. S., 1, 41.

BOOK REVIEWS

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cross references making the index of practical aid even to those not well versed in some of the technical terms of the liquor traffic.

Some of our worthy compatriots may even derive a few moments of concealed pleasure by glancing through the more or less familiar

jargon contained in Part II, and entitled, "Terminology of the Liquor Trade."

The volume is highly recommended for its thoroughness and completeness and for its far reaching utility.

CASE NOTES

(Continued from page 22)

of each parcel or interest may, as to the same, maintain suit upon such covenant against the original covenantor or his legal representative . . . ." 15 C. J. 1259. In *Dickinson v. Holmes,* 8 Gratt. (49 Va.) 353, 407, it is stated: "A covenant running with the land would be of very little value if it ceased to run with the land whenever the land was divided, whether by act of law or by the act of the owner . . . . The rule of law that covenants are not apportionable is founded on convenience. But injustice is a greater evil than inconvenience." Although the decision in the instant case can not be justified on the theory that a covenant running with the land is not apportionable, nor on the theory that the benefit attached only to that portion of the estate immediately adjoining the right of way; it may be justified on the theory that the covenant involved was not apportionable as to this plaintiff, because his subdivision *was not so situated that, under ordinary circumstances, the burden imposed could be used or enjoyed for its benefit.*

The assumption made by the court that the covenant to fence is one that will run with the land seems to be a proper assumption. Tiffany, Real Property (2 vol. in 1) 757. The covenant does "touch or concern the land" within the requirement as defined in Spencer's Case, 5 Coke, 16a. It would seem, however, that the assumption as to the right of the plaintiff to maintain an action for breach of covenant can hardly be justified. The covenant runs with the estate and not with the land. As a *lessee* of a portion of the premises, there is neither privity of contract nor privity of estate. "But a plain distinction is made between the holder of a part of the land, and the holder of part of the estate . . . The same distinction is carried into the modern action of covenant. The *assignee, upon whom is cast the benefit or the obligation of the covenants, is he who holds the whole estate or term. St. Clair v. Williams,* 7 Ohio, (part 11) 110; 30 Am. Dec. 194; 15 C. J. 1259.

W. E. BURBY.